

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 13, 2006 Session

CLIFFORD MICHAEL JOHNSON v. NISSAN NORTH AMERICA, INC.

**Appeal from the Circuit Court for Rutherford County
No. 47732 J. Mark Rogers, Judge**

No. M2006-00046-COA-R3-CV - Filed on February 22, 2007

An employee of Nissan North America appeals the summary dismissal of his action for retaliatory discharge. The employee alleged he was terminated because he filed a workers' compensation claim. Nissan denied liability stating the termination was due to the employee's violation of medical restrictions related to lifting and bending. Nissan filed a Motion for Summary Judgment, which the trial court granted. We have concluded, as the trial court did, that Nissan stated a legitimate, non-pre-textual reason for termination, and the employee failed to offer specific facts to realistically challenge Nissan's stated reason for termination. Therefore, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Joy L. Davis, Franklin, Tennessee, for the appellant, Clifford Michael Johnson.

Larry G. Trail, Murfreesboro, Tennessee; Michael P. Berger, Smyrna, Tennessee; and Jonathan R. Mook, Alexandria, Virginia, for the appellee, Nissan North America, Inc.¹

OPINION

Clifford Michael Johnson began working for Defendant, Nissan North America, Inc., in 1985. He worked there successfully for more than fifteen years. On August 8, 2000, however, Johnson sustained a serious work-related injury to his back that necessitated surgery for which he filed a workers' compensation claim that is at issue in this litigation.

Following this injury, Johnson's doctor placed him on a twenty-five pound occasional lifting restriction, a forty-pound carrying restriction, and a repetitive bending at the waist restriction. Nissan considered Johnson's medical restrictions and found a place on an assembly line for him with duties

¹Larry G. Trail was counsel of record and signed the appellee's brief. Thereafter, Mr. Trail died unexpectedly, following which Mr. Mook made an appearance and presented the argument for Nissan before this Court.

that would not violate his restrictions. With these restrictions in place, Johnson returned to work in June of 2001.

In August of 2001, the insurance adjuster overseeing Johnson's workers' compensation claim offered to settle his claim for two times his doctor's impairment rating. Johnson did not initially accept this settlement offer, but he ultimately accepted it in November of 2001.

Johnson learned in early October 2001 that Nissan was eventually going to be phasing out the assembly line on which Johnson was working. Concerned that he might lose his job if there were no more positions that could accommodate his restrictions, he told his medical case manager at Nissan that he wanted to have his restrictions lifted. Johnson, however, continued to be symptomatic and complained of pain and discomfort.

Upon learning that Johnson wanted his restrictions lifted despite still being symptomatic, the insurance adjuster handling Johnson's workers' compensation claim asked to have Johnson placed under surveillance.² Nissan's department manager of human resources, Kerry Dove, agreed to the surveillance of Johnson, which took place from October 27, 2001, to November 11, 2001. The surveillance of Johnson's activities away from the workplace showed, *inter alia*, Johnson tossing a fifty-pound bag of feed into his truck, bending his back severely at the waist while grooming a horse, riding a horse at a semi-fast pace on multiple occasions, bending at the waist to lift cut logs, tossing logs onto a trailer, and placing logs onto a wood pile. The video surveillance also showed Johnson bending over ninety degrees nineteen times in a two-minute time span, and in another five-minute time span, it showed him bending forty times.

On November 12, 2001, Johnson claimed he strained his back lifting a box of pistons and thus reported his fourth³ on-the-job injury to his manager who sent him to the medical department, where he was examined by Nissan company physician, Dr. Moore. Dr. Moore determined this was not a new injury but rather an exacerbation of his existing back injury for which he was on the permanent restrictions.⁴ Johnson filed a workers' compensation claim related to this November 12 injury, and he also filed a subsequent claim related to an injury on December 10, 2001.

In early January 2002, Dr. Moore reviewed the surveillance tapes of Johnson and concluded that the November 12, 2001, injury was more likely caused by his activities shown in the video than

²The reason given for placing him under surveillance was that management at Nissan and the adjuster handling his workers' compensation claim thought it odd that an employee with a back injury as serious as Johnson's, who continued to indicate he was in pain, would ask to have his permanent restrictions lifted.

³Johnson had filed two previous workers' compensation claims in 1993 and 1997, both of which were settled. His third claim was the August 8, 2000, claim, and thus, this claim for the injury on November 12, 2001, was the fourth.

⁴During this visit to the doctor, Nissan's Dr. Moore noted that Johnson was "exhibiting a behavior we call magnifying where only very slight movements result in somewhat exaggerated facial expressions." He believed Johnson was exaggerating his level of discomfort.

something at work. Dr. Moore further concluded the activities in which Johnson had engaged violated his permanent restrictions.

Dr. Moore shared his opinion that Johnson's activities violated his medical restrictions via e-mail on January 8, 2002. Based upon Dr. Moore's assessment, Nissan's human resource personnel proposed a termination package for Johnson, which was presented to the appropriate management committee at Nissan. Thereafter, the decision was made to terminate Johnson. On January 17, 2002, Johnson was advised that his employment was terminated for violating his medical restrictions. Subsequent to his termination, the workers' compensation insurance company denied his November and December 2001 claims.⁵

Johnson filed this action one year later, on January 17, 2003, alleging that his termination was a "retaliatory action in response to [his] exercise of his rights under the Tennessee Workers' Compensation Act, pursuant to a work related injury of August 8, 2000." Nissan filed a Motion for Summary Judgment arguing that Johnson had failed to establish a causal connection necessary to make out a prima facie case for discrimination and that even if he had established a prima facie case, Nissan had articulated a non-pretextual reason for terminating Johnson. The trial court granted Nissan's motion, and Johnson appeals.⁶

STANDARD OF REVIEW

The issues were resolved in the trial court upon summary judgment. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Advert. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we first determine whether factual disputes exist. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

⁵The workers' compensation claims are not at issue in this appeal.

⁶This is the second appeal in this matter. In a previous interlocutory appeal, Nissan objected to the discovery of medical information concerning other Nissan employees. In that interlocutory appeal, Nissan contended it may violate the Americans with Disabilities Act if it provided the discovery as the trial court had ordered. The trial court ordered Nissan to identify: (1) every employee terminated between August 2000 and January 2002; (2) which of these employees filed workers' compensation claims or received benefits within one year preceding termination; and (3) each employee on which Nissan conducted surveillance between August 2000 and January 2002. We reversed, finding Johnson failed to make a compelling showing of relevance and failed to establish that the value of the discovery sought, which pertained to information contained in the personnel and medical records of current and former employees of Nissan, outweighed the privacy interests of those individuals who were not parties to this action. *See Johnson v. Nissan North America, Inc.*, 146 S.W.3d 600 (Tenn. Ct. App. 2004).

Summary judgments are proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd*, 847 S.W.2d at 210; *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001); however, they are not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that party is entitled to judgment as a matter of law. *Godfrey*, 90 S.W.3d at 695. Summary judgment should be granted at the trial court level when the undisputed facts and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001). The court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, discard all countervailing evidence, and, if there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. *Byrd*, 847 S.W.2d at 210; *EVCORP. v. Ross*, 528 S.W.2d 20 (Tenn. 1975). To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats the non-moving party's claim. *Cherry v. Williams*, 36 S.W.3d 78, 82-83 (Tenn. Ct. App. 2000).

ANALYSIS

In an action for discharge in retaliation for asserting a workers' compensation claim, the employee must establish that:

- (1) he was an employee of the defendant at the time of the injury;
- (2) he made a claim against the defendant for workers' compensation benefits;
- (3) the employer terminated his employment; and
- (4) the claim for workers' compensation benefits was a substantial factor in the employer's motivation to terminate the employment.

Anderson v. Standard Register Co., 857 S.W.2d 555, 558 (Tenn. 1993) (citing *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984), *Chism v. Mid-South Milling Co., Inc.*, 762 S.W.2d 552 (Tenn. 1988), *Johnson v. Saint Francis Hosp., Inc.*, 759 S.W.2d 925 (Tenn. Ct. App. 1988)).

The burden of proof rests upon the employee to prove the elements of the cause of action. *Anderson*, 857 S.W.2d at 558. Proof of discharge without evidence of a causal relationship between the claim and discharge does not present an issue for a jury. *Id.* If an employee can show a prima facie case for retaliatory discharge, the burden of proof shifts to the employer to show a non-discriminatory reason for discharge. If the defendant employer, in its answer to the complaint, presents a legitimate, non-discriminatory reason for the employment action, the burden then shifts back to the employee to prove the explanation is pretextual. *Frizzell v. Mohawk Industries*, No. M2004-01598-COA-R3-CV, 2006 WL 1328773, at *3 (Tenn. Ct. App. May 15, 2006). In doing so, the employee “must present specific, admissible facts, which realistically challenge the defendant's

stated reasons.” *Id.*; *Wilkins v. Eaton Corp.*, 790 F.2d 515, 521 (6th Cir.1986); *Silpacharin v. Metro. Gov’t*, 797 S.W.2d 625, 629 (Tenn. Ct. App. 1990).

The employee may challenge the employer’s stated reason for termination and thereby create a question of fact as to a pretextual defense by showing the employer’s reasons “have no basis in fact, or if they have a basis in fact, by showing that they were not really factors motivating the discharge, or if they were factors, by showing that they were jointly insufficient to motivate the discharge.” *Frizzell*, 2006 WL 1328773, at *3 (citing *Moore v. Nashville Elec. Power Bd.*, 72 S.W.3d 643, 652 (Tenn. Ct. App. 2001) (quoting *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1329-30 (6th Cir. 1994)). The employee, however, faces summary dismissal of his claim if he is unable to demonstrate that he could prove the employer’s reason for the discharge was pretextual. *Id.*; *DeVore v. Deloitte & Touche*, No. 01A01-9602-CH-00073, 1998 WL 68985, at *11 (Tenn. Ct. App. Feb. 20, 1998).

In its Motion for Summary Judgment, Nissan stated that its reason for the termination of employment was Johnson’s multiple violations of his medical restrictions. Nissan established that, at all times material to this action, Johnson was under medical restrictions due to his previous injuries. The three primary restrictions were: (1) a twenty-five pound occasional lifting restriction; (2) a forty-pound carrying restriction; and (3) a repetitive bending at the waist restriction. Video surveillance, however, showed Johnson tossing a fifty-pound bag of feed into his truck, bending his back severely at the waist while grooming a horse, riding a horse at a semi-fast pace on multiple occasions, bending at the waist to lift cut logs, tossing logs onto a trailer, and placing logs onto a wood pile. The video also showed Johnson bending over ninety degrees nineteen times in a two-minute time span, and in another five-minute time span, it showed him bending forty times. Furthermore, Nissan’s expert witness, Dr. Moore, stated the activities shown on the surveillance tapes constituted violations of his medical restrictions.

The foregoing evidence shifted the burden of proof back to Johnson, which required that he present “specific, admissible facts, which realistically challenge” Nissan’s stated reasons for his termination. *Frizzell*, 2006 WL 1328773, at *3 (other citations omitted). Johnson did not come forward with any specific admissible facts to challenge Nissan’s stated reason for his termination or the testimony of Dr. Moore. Since Johnson failed to provide any evidence to contradict the video surveillance or the testimony of Dr. Moore, it is factually undisputed that the activities violated Johnson’s restrictions.

Tenn. R. Civ. P. 56 comes into play when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. The issues that lie at the heart of evaluating a summary judgment motion are: (1) whether a factual dispute exists; (2) whether the disputed fact is material to the outcome of the case; and (3) whether the disputed fact creates a genuine issue for trial. *See Byrd*, 847 S.W.2d at 214; *see also Staples v. CBL & Associates, Inc.*, 15 S.W.3d 83, 88-89 (Tenn. 2000). When the facts material to the application of a rule of law are undisputed, the application is a matter of law for the court since there is nothing to submit to the jury to resolve in favor of one party or the other. *Byrd*, 847 S.W.2d at 214. Stated another way, when

there is no dispute over the evidence establishing the facts that control the application of a rule of law, summary judgment is an appropriate means of deciding that issue. *Id.*

The party seeking summary judgment has the burden of demonstrating that there are no disputed, material facts creating a genuine issue for trial, and that it is entitled to judgment as a matter of law. *Byrd*, 847 S.W.2d at 214; *Staples*, 15 S.W.3d at 88. The moving party can make the required showing by affirmatively negating an essential element of the non-moving party's claim or by establishing an affirmative defense that defeats the non-moving party's claim. *Staples*, 15 S.W.3d at 88-89 (citing *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997)). If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings but must offer proof to establish the existence of the essential elements of the claim. *Id.*

In the case at bar, Johnson failed to present any evidence to contradict the video surveillance of his activities or Dr. Moore's testimony in which he stated that Johnson's activities violated his medical restrictions. With those facts being undisputed, Nissan negated an essential element of Johnson's claim and established an affirmative defense by demonstrating that Johnson's employment was terminated because he violated the medical restrictions. Accordingly, Nissan is entitled to summary judgment.⁷

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Appellant, Clifford Michael Johnson.

FRANK G. CLEMENT, JR., JUDGE

⁷ Our ruling on this issue renders the other issue moot.